

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

STATE OF TEXAS)
)
)
VS.) CIVIL ACTION NO.
) 1:14-CV-254
)
UNITED STATES, ET AL)

HEARING
BEFORE THE HONORABLE ANDREW S. HANEN
AUGUST 31, 2016

A P P E A R A N C E S

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13:33:58 1 THE COURT: Thank you. Be seated.

13:34:01 2 All right. All right. We're here in
13:34:08 3 B-54-CV-25 -- B-14-CV-254, Texas versus the
13:34:17 4 United States.

13:34:20 5 Mr. Bitter, you want to introduce yourself
13:34:22 6 for the record?

13:34:22 7 MR. BITTER: Yes, Your Honor. Adam Bitter
13:34:24 8 with the Texas Attorney General's office for the
13:34:26 9 Plaintiff states.

13:34:27 10 THE COURT: All right.

13:34:29 11 Ms. Ricketts or Mr. Schwei?

13:34:33 12 MR. GILLIGAN: Well, Mr. Gilligan, if it
13:34:35 13 please the Court?

13:34:36 14 THE COURT: Or, take your pick.

13:34:37 15 MR. GILLIGAN: James Gilligan with the
13:34:39 16 Department of Justice for the Government, Your Honor.

13:34:40 17 With me at counsel table, as you have noted,
13:34:43 18 are David Schwei, Jennifer Ricketts, as well as
13:34:47 19 John Tyler and Mr. Hu.

13:34:49 20 THE COURT: Mr. Hu, I -- I know.

13:34:51 21 Ms. Perales?

13:34:52 22 Oh, I'm sorry, and Mr. Smith, I know.

13:34:54 23 MS. PERALES: Good afternoon, Your Honor.
13:34:56 24 Nina Perales for the Doe Intervenors.

13:34:59 25 And with me today is my co-counsel

13:35:00 1 Mr. Carlos Garcia.

13:35:02 2 THE COURT: Okay. All right.

13:35:04 3 Mr. Fogler, welcome to South Texas.

13:35:07 4 MR. FOGLER: Good to be here, Your Honor. I
13:35:09 5 represent the sealed filer.

13:35:11 6 THE COURT: All right.

13:35:12 7 Okay. Let me start with what I think is a
13:35:16 8 simple issue first. And, if it turns out I'm wrong, you
13:35:21 9 know, this hearing may take more time than I think it's
13:35:25 10 going to take.

13:35:26 11 We scheduled this hearing -- or originally
13:35:30 12 it was scheduled for a week or two ago, but we
13:35:33 13 originally scheduled the hearing in August, more or
13:35:36 14 less, as a scheduling conference.

13:35:40 15 The Government, and by "the Government", I
13:35:42 16 mean, the United States Government, has filed a motion
13:35:46 17 for rehearing, basically, in the Supreme Court.

13:35:49 18 Now, I've always been under the impression
13:35:52 19 that that stays the proceeding. And, so, does anyone
13:35:57 20 under -- is anyone under a different impression?

13:36:01 21 MR. TYLER: Your Honor, this is John Tyler.
13:36:04 22 Perhaps I can speak to that.

13:36:05 23 THE COURT: All right.

13:36:05 24 MR. TYLER: I've had the opportunity to
13:36:08 25 confer with counsel for the states and for the

13:36:09 1 John Doe's -- Jane Doe's, I'm sorry, and we all agree
13:36:12 2 that it would be appropriate for Your Honor to continue
13:36:14 3 the stay until such time as the Supreme Court does rule
13:36:18 4 on the United States' petition for re-hearing.

13:36:21 5 And, thereafter, to allow the parties 30
13:36:24 6 days to confer amongst ourselves before we come back
13:36:26 7 before the Court on the scheduling matters.

13:36:28 8 THE COURT: All right. And that's -- is
13:36:29 9 there any objection to that?

13:36:31 10 MR. BITTER: No, Your Honor.

13:36:31 11 THE COURT: All right. That's what we'll
13:36:33 12 do.

13:36:33 13 MR. TYLER: Thank you, Your Honor.

13:36:35 14 THE COURT: All right. Let me move to -- we
13:36:48 15 have a fairly, what I would call, interesting motion to
13:36:52 16 intervene by some prisoners in the federal prison
13:36:59 17 system.

13:37:03 18 Some of that was interesting, some of it was
13:37:09 19 actually, I mean, when you think about it, one of the
13:37:12 20 prisoners at least claims that they are in jail for
13:37:15 21 violating Title 8 Section 1324, which is transporting
13:37:21 22 illegal aliens, and her argument was, well, if -- why
13:37:25 23 should I be in jail for transporting them if the illegal
13:37:29 24 aliens aren't in trouble for being in the country to
13:37:32 25 begin with?

13:37:34 1 The other three were convicted of other, as
13:37:38 2 far as I can remember, unrelated immigration crimes.

13:37:42 3 Is there anyone that has any feeling that
13:37:49 4 they have a vested interest in this case, like
13:37:54 5 Ms. Perales' clients, such that they -- they qualify as
13:37:58 6 Intervenors in this case?

13:38:00 7 MR. TYLER: Again, Your Honor, I think I can
13:38:02 8 address that. As you're aware, the United States has
13:38:06 9 opposed this motion for intervention. I mean, there's
13:38:09 10 four requirements that a party seeking to intervene must
13:38:13 11 meet in order to succeed on such motion.

13:38:17 12 And I refer to them as the four felons do
13:38:19 13 not meet --

13:38:20 14 THE COURT: The four felons.

13:38:22 15 MR. TYLER: -- do not meet any one of those
13:38:25 16 elements, Your Honor. So, you know, our -- our
13:38:27 17 opposition was two and a half pages. We thought that's
13:38:29 18 what it deserves. And I can respond to any questions
13:38:32 19 Your Honor might have, but I, you know, it's untimely.

13:38:35 20 They don't have a -- a legally protectable
13:38:39 21 interest in DAPA. And the outcome of this case will not
13:38:43 22 put that interest, if it even existed, in jeopardy.

13:38:49 23 In fact, if the Government were ever to
13:38:50 24 succeed in this case, the four felons would have
13:38:53 25 opportunity at that time to seek the relief they want,

13:38:55 1 which is, amongst other things, they've asked Your Honor
13:38:59 2 to make them millionaires. Five million a piece I think
13:39:02 3 it is.

13:39:02 4 THE COURT: All right.

13:39:02 5 MR. TYLER: So we think this is very
13:39:04 6 straight forward, Your Honor, and we oppose.

13:39:06 7 THE COURT: Mr. Bitter, is the -- do the
13:39:08 8 states have any objection to the Government's position?

13:39:12 9 MR. BITTER: No, we share that position. We
13:39:14 10 did not file a -- a formal response because it didn't,
13:39:16 11 you know, request any relief from the states. But we --
13:39:19 12 we share in the other party's position that there's no
13:39:21 13 merit behind the motion to intervene and, for that
13:39:25 14 matter, the other -- the other motions that the --
13:39:26 15 that -- that the inmates filed as well.

13:39:27 16 THE COURT: All right. Ms. Perales?

13:39:28 17 MS. PERALES: Your Honor, we also filed an
13:39:30 18 opposition as docket 409 and simply add that we also
13:39:34 19 believe that venue is improper here because the prisoner
13:39:38 20 movants are incarcerated in Fort Worth in the Northern
13:39:41 21 District of Texas.

13:39:42 22 THE COURT: All right.

13:39:43 23 Well, I don't think I need to venture in on
13:39:49 24 the venue issue. I -- I'm denying the motion.

13:39:52 25 And I think -- believe they have a related

13:39:56 1 motion, and I can't remember what it was, but I'm also
13:39:58 2 denying that one.

13:39:59 3 Okay. That brings us to what I think is the
13:40:04 4 last issue, although I'll let counsel brief me if
13:40:08 5 there's some other issue.

13:40:09 6 In our last hearing, which was after I
13:40:12 7 issued a sanctions order, I allowed the United States to
13:40:21 8 file some affidavits.

13:40:23 9 Now, as y'all will recall, as early as June
13:40:27 10 of 2015, I solicited affidavits from the United States
13:40:33 11 and they didn't give me any.

13:40:36 12 In fact, at one point, I had, basically to
13:40:40 13 paraphrase what I said, I said: Do I have any
13:40:42 14 affidavits? Do I have any proof? I mean, that's what I
13:40:45 15 really need to see. And that was on June 25th of 2015
13:40:50 16 asking for affidavits to support the Government's
13:40:54 17 position. And I was not favored with any. And then we
13:40:58 18 had a hearing on August 19th of 2015.

13:41:02 19 On April 8th of 2016, I put out an order
13:41:05 20 that says, look, I'm getting ready to rule. You know,
13:41:09 21 what do you want me to rule on? And, even then, I
13:41:12 22 didn't get any affidavits.

13:41:14 23 So, in our hearing last June, June 7th of
13:41:19 24 2016, I said, okay, do you want to file affidavits? And
13:41:25 25 the Government finally has done that.

13:41:27 1 Now, the question is, and, Mr. Bitter, I'm
13:41:29 2 going to start with you, and my question is twofold:
13:41:36 3 Should I consider the affidavits? I mean, it's kind of
13:41:39 4 like, you know, we've had the jury trial, now the losing
13:41:44 5 side wants to put on witnesses. Number one.

13:41:47 6 And then my second question to you is going
13:41:49 7 to be, if I decide to consider it, does -- will it
13:41:53 8 change the ruling?

13:41:56 9 And I -- and, having said that, I -- I
13:41:58 10 realize that you have only seen redacted portions.

13:42:01 11 MR. BITTER: Right, Your Honor, and that's
13:42:02 12 what I was going to speak to.

13:42:03 13 Consistent with what the Plaintiff states
13:42:06 14 indicated at the -- at the last status conference, we
13:42:08 15 break the May 2016 order into -- into two parts; one
13:42:13 16 being the, you know, the -- the portions regarding legal
13:42:18 17 ethics training and that piece.

13:42:20 18 And as to that piece, although the most
13:42:23 19 recent filing from the Defendants does -- does contain
13:42:26 20 some additional information that we had not seen before
13:42:29 21 and some additional affidavits, we -- we still don't
13:42:32 22 believe we're in a position to make an adversarial
13:42:36 23 presentation on those issues because there's so much
13:42:38 24 information that we don't see.

13:42:39 25 I think as -- as a general matter, the Court

13:42:40 1 allowed the Defendants to submit additional affidavits.
13:42:43 2 I don't think we take any position on whether that was
13:42:47 3 proper or improper for them to submit additional
13:42:50 4 affidavits. Just that, even with those additional
13:42:53 5 affidavits, we're still not in a position to determine
13:42:55 6 whether the Court's ruling on that issue in terms of the
13:42:59 7 misrepresentations was -- was proper or not.

13:43:02 8 THE COURT: Let me ask you a question. And
13:43:03 9 this may not be fair because it's -- it wasn't
13:43:06 10 necessarily the subject matter that maybe you were
13:43:10 11 expecting to address.

13:43:14 12 The crux of the sanctions were certain
13:43:18 13 statements that were made to the court that weren't
13:43:25 14 true. But the underlying subject matter concerns
13:43:33 15 certain DACA recipients who, instead of what the Court
13:43:37 16 and the states were under the impression were getting
13:43:41 17 two year renewals, actually got three year renewals.

13:43:45 18 We are coming up, basically, on the
13:43:50 19 anniversary, the second anniversary, of those renewals.

13:43:54 20 Do you, as -- and setting aside whether, you
13:43:58 21 know, what the attorney conduct was -- do you have any
13:44:04 22 idea of whether these renewals, the difference between a
13:44:09 23 two year and a three year, has caused any problems to
13:44:11 24 the states?

13:44:12 25 MR. BITTER: Well, we're not really, at this

13:44:14 1 point, able to determine that. All we have are hard
13:44:17 2 numbers in terms of how many people -- obviously, we
13:44:19 3 know some additional information on the post-injunction
13:44:22 4 grant, putting -- putting those aside for right now.

13:44:24 5 As the pre-injunction grants, we really just
13:44:26 6 have totals, we have breakdowns between the states, but
13:44:29 7 we really don't have any information to be able to say
13:44:31 8 this particular individual received this particular
13:44:33 9 benefit. And that's why, you know, going back to some
13:44:36 10 of the -- the states' previous requests that we had
13:44:39 11 sought, not only personal identifiable information, but
13:44:43 12 also that the -- that the Defendants take action to
13:44:45 13 correct the records as to the pre-injunction grantees
13:44:49 14 just like the post-injunction grantees.

13:44:51 15 But the answer to your question, we're
13:44:52 16 really not in a position to say precisely how much, you
13:44:56 17 know, how much in the way of benefits have been
13:44:58 18 conferred on these individuals.

13:44:59 19 THE COURT: Okay. All right. Well, thank
13:45:03 20 you, Mr. Bitter.

13:45:04 21 MR. BITTER: Thank you, Your Honor.

13:45:05 22 THE COURT: Ms. Perales, do you -- I know
13:45:07 23 you -- you're concerned about the remedy, but do you
13:45:10 24 want to weigh in on the actual -- whether the Court
13:45:13 25 should consider the affidavits or not?

13:45:14 1 MS. PERALES: Your Honor, we, too, have only
13:45:19 2 seen redacted versions of the material. We do not take
13:45:25 3 a position on the -- the -- the sanctions issues related
13:45:30 4 to the portions aside from the DACA portions.

13:45:34 5 That was inartfully put, Your Honor, but the
13:45:36 6 only portion of the May 19 order that we take a position
13:45:39 7 on relates to the DACA information and not to the
13:45:44 8 remaining sanctions for the Department of Justice or --
13:45:47 9 or whether the Court should accept the affidavits.

13:45:52 10 THE COURT: Let me ask you a question. I
13:45:54 11 know you're concerned and your clients are concerned and
13:45:58 12 some of the amicus briefs have expressed a concern about
13:46:02 13 a portion of my order that ordered certain biographical
13:46:10 14 information to be filed under seal.

13:46:14 15 Now, I note that the same amicus briefs that
13:46:17 16 were concerned about that filed information under seal
13:46:20 17 that -- so it's the same seal that was protecting them
13:46:23 18 that's protecting the information, but let me ask you a
13:46:28 19 question. If the Court decided to stick with its order,
13:46:32 20 or at least its order of preparation of that, but
13:46:36 21 ordered it kept by, say, one of the attorneys for the
13:46:46 22 Government until such a time as the states showed that,
13:46:50 23 would -- would your clients have any problem with that?

13:46:53 24 MS. PERALES: Yes, Your Honor. I believe
13:46:55 25 referring back to the June 7th argument, and I -- I

13:47:00 1 don't want to repeat any of the argument that we
13:47:02 2 presented then or rehash the brief, the issue of fear
13:47:07 3 and concern about the disclosure of private information,
13:47:12 4 we believe, arises when these affected individuals would
13:47:18 5 learn that their names and addresses were being prepared
13:47:22 6 in a list and held by the Department of Justice for
13:47:25 7 potential disclosure.

13:47:27 8 THE COURT: Well, the federal Government
13:47:29 9 already has that list.

13:47:30 10 MS. PERALES: Well, my understanding --

13:47:32 11 THE COURT: I mean, they already have all
13:47:34 12 the names and addresses. Unless you're telling me they
13:47:36 13 don't, I'd be shocked. I mean, but, there's a whole
13:47:39 14 application process to be -- that you have to go through
13:47:43 15 to -- to get into DACA.

13:47:46 16 MS. PERALES: Yes, Your Honor. And, without
13:47:48 17 speaking for other parties here, certainly it's true
13:47:52 18 that the recipients of three year work permits know that
13:47:55 19 their personal information resides somewhere within the
13:47:57 20 Department of Homeland Security or within CIS.

13:48:02 21 But the -- the news or the information that
13:48:05 22 that information was then being pulled out of those data
13:48:08 23 bases and assembled and held by the Department of
13:48:12 24 Justice for potential future disclosure would create the
13:48:18 25 kind of fear and worry that we described in the

13:48:20 1 affidavits and in our briefing. We do believe that it
13:48:24 2 would have a negative effect.

13:48:25 3 And then also, of course, Your Honor, we
13:48:28 4 believe that such an order is not appropriate as a
13:48:33 5 sanction for what the Court has found to be misconduct
13:48:36 6 here.

13:48:37 7 THE COURT: Okay. And I can't -- I don't
13:48:39 8 remember which affidavit it was, but -- and whether
13:48:44 9 it -- it was in a redacted or unredacted form, but one
13:48:47 10 of the Government's affidavits said, we weren't
13:48:49 11 concerned about the difference between two or three
13:48:52 12 years because we know we could always get back the extra
13:48:55 13 year. Now I'm paraphrasing.

13:48:58 14 MS. PERALES: Uh-huh.

13:48:59 15 THE COURT: And, obviously, I assume that
13:49:02 16 your clients, as well as the amicus briefs filed on
13:49:05 17 behalf of the DACA people, would find that to be
13:49:09 18 actually more damaging than preparing a list?

13:49:12 19 MS. PERALES: I -- I couldn't weigh those
13:49:13 20 two things, Your Honor, particularly because, right now,
13:49:17 21 a two year work permit is renewable, just like a three
13:49:21 22 year work permit is.

13:49:22 23 The practical impact on an individual would
13:49:25 24 be having to pay the \$465 fee for renewal perhaps a year
13:49:30 25 earlier than otherwise anticipated for somebody with a

13:49:33 1 three year work permit.

13:49:34 2 THE COURT: Okay. So every time they renew
13:49:36 3 it, they'd have to pay that fee?

13:49:38 4 MS. PERALES: Yes, Your Honor, that's right.

13:49:40 5 THE COURT: Okay.

13:49:40 6 MS. PERALES: Whether or not the Government
13:49:42 7 has the discretion, and it always has, to determine the
13:49:47 8 length of deferred action for deferred action
13:49:50 9 recipients, I did want to respond to something that the
13:49:53 10 court said very early in the hearing about the Court's
13:49:57 11 understanding that the petition for rehearing in the
13:49:59 12 U.S. Supreme Court stays the proceedings down here.

13:50:04 13 And we would say, not only that we agree
13:50:09 14 with that, but point the Court to Supreme Court Rule 45,
13:50:13 15 which says that the pendency of the petition for
13:50:16 16 rehearing, even in an appeal from a federal court, which
13:50:19 17 is what we have here, stays the issuance of a mandate or
13:50:24 18 what would otherwise be the final ruling of the court.

13:50:28 19 Because of that, and as we argued on June
13:50:31 20 7th, we believe that the kind of order related to DACA
13:50:37 21 recipients' information is so closely related to merits
13:50:42 22 relief in this case, that the Court, at this point in
13:50:46 23 time, does not have jurisdiction to order either the
13:50:52 24 information to be disclosed to the Court or assembled
13:50:55 25 into some kind of list for potential further disclosure.

13:50:58 1 THE COURT: Well, except I've already
13:51:01 2 ordered it. So I'm talking about withdrawing the order.

13:51:05 3 MS. PERALES: We would appreciate that,
13:51:07 4 Your Honor.

13:51:07 5 THE COURT: Well, do I have jurisdiction to
13:51:09 6 do that?

13:51:09 7 MS. PERALES: Yes, I believe the Court does
13:51:11 8 have jurisdiction to do that. Yes. To vacate its order
13:51:15 9 pursuant to the motion of -- of the United States.

13:51:19 10 Or to stay it pending the appeal that's been
13:51:21 11 filed by the Doe's, which is still sitting in the Fifth
13:51:25 12 Circuit at this point, but which has been stayed by the
13:51:28 13 Fifth Circuit in light of the federal Government's
13:51:32 14 motion to vacate.

13:51:33 15 THE COURT: All right.

13:51:34 16 MS. PERALES: Thank you, Your Honor.

13:51:36 17 THE COURT: All right. Mr. Gilligan,
13:51:41 18 Ms. Ricketts, who wants to address my issues here?

13:51:44 19 MR. GILLIGAN: Good afternoon, Your Honor.
13:51:47 20 I will attempt to do so.

13:51:49 21 If the -- if it please the Court, I'll --
13:51:57 22 I'll start with the issue regarding whether the Court
13:52:02 23 should consider the additional evidence we submitted on
13:52:05 24 July 31st.

13:52:07 25 Although the -- the question the Court --

13:52:12 1 the Court posed, I assume it to mean having DHS provide
13:52:18 2 the PII to the Department of Justice for safe keeping
13:52:20 3 for some period of time. That's -- that -- that is --
13:52:23 4 that's an intriguing one and I'll -- I'll address that
13:52:26 5 as well.

13:52:26 6 Your -- Your Honor, the -- the -- the first
13:52:32 7 thing I'd -- I'd like to say, with the court's
13:52:34 8 indulgence, regarding this court's May 19th order and
13:52:38 9 the sanctions issue, is -- and it's -- and it's the
13:52:43 10 first thing to say, I think, which is that we are sorry
13:52:47 11 for the mistakes that we made that led to this
13:52:53 12 situation.

13:52:53 13 We are sorry for leading this court to
13:52:55 14 believe that it had been deceived and we are sorry for
13:52:59 15 the Court's time and energies that this matter has
13:53:02 16 consumed. And -- and we hope that the sworn
13:53:06 17 declarations that we have now submitted to the court
13:53:10 18 have provided the assurance that the court was looking
13:53:13 19 for, that none of what has occurred was ever intentional
13:53:17 20 on our part or on the part of any of our attorneys
13:53:21 21 involved in the defense of this case.

13:53:22 22 And -- and we are extraordinarily grateful
13:53:25 23 that the Court extended to us the opportunity to -- to
13:53:30 24 provide that evidence. We think it shows quite
13:53:35 25 powerfully in detail, in total over a hundred pages of

13:53:42 1 sworn testimony, that demonstrate uniformly that there
13:53:46 2 was never any intent to deceive this court about the
13:53:49 3 three year terms of deferred action or -- or to conceal
13:53:53 4 that fact from the Court.

13:53:55 5 And, so, we think that the just course would
13:54:00 6 be, yes, for the Court to consider that evidence and to
13:54:04 7 come to what we believe is the just result to which that
13:54:08 8 evidence leads, which is that the Court's May 19th
13:54:13 9 sanction orders, both of them, be -- be withdrawn and,
13:54:19 10 as well, the findings on which they rest.

13:54:21 11 We have -- we have tried -- we understand
13:54:27 12 the Court's frustration, as it was expressing earlier,
13:54:33 13 with this process as it has unfolded. We have
13:54:38 14 attempted, throughout this process, to -- to convince
13:54:42 15 the Court of the department's good faith in this matter,
13:54:46 16 of the department's dedication to its duty of candor and
13:54:50 17 the highest standards of legal ethics.

13:54:54 18 And we recognize, particularly in the wake
13:54:58 19 of the court's May 19th order, that we have failed to do
13:55:01 20 so, at least with our words. Which is why, regardless
13:55:03 21 of how this court may rule on the sanctions issue
13:55:06 22 ultimately, Mr. Mizer, the head of the civil division,
13:55:12 23 has directed the course of supplemental training for all
13:55:15 24 civil division attorneys, approximately 1,000 of them,
13:55:20 25 if my memory serves, including himself.

13:55:23 1 Because while we are --

13:55:24 2 THE COURT: Let me -- let me ask you a
13:55:25 3 question about that. And -- and I actually greatly
13:55:28 4 appreciate the fact that he's done that. I mean, I
13:55:31 5 think that's a worthy step.

13:55:36 6 Let me -- let me just ask for my own
13:55:38 7 edification here. The attorneys at the Department of
13:55:46 8 Justice travel nationwide and appear in courts all over
13:55:51 9 the nation.

13:55:55 10 MR. GILLIGAN: Correct.

13:55:56 11 THE COURT: The McDade amendment, whether
13:55:58 12 y'all agree with it or not, and I know there's -- it's
13:56:01 13 not without its own controversy when it -- when it got
13:56:05 14 passed, basically requires the Department of Justice
13:56:08 15 lawyers to abide by any of the local Rules of Ethics in
13:56:16 16 whatever court they appear in. By local, I mean, state.

13:56:20 17 MR. GILLIGAN: Right.

13:56:22 18 THE COURT: What steps do y'all take to even
13:56:25 19 make sure you know what they are? And I -- and I -- and
13:56:28 20 this is just for my own edification. This isn't a trap.

13:56:32 21 I mean, does the Department of Justice have
13:56:34 22 any, you know, rule that, okay, you know, you're going
13:56:43 23 to appear in Texas. You know, before you appear, you
13:56:47 24 need to read the Texas Rules of Ethics so you make sure
13:56:50 25 you're complying with it?

13:56:52 1 I mean, what do y'all do to make sure you're
13:56:55 2 complying with the McDade amendment?

13:56:57 3 MR. GILLIGAN: Well, Your Honor, I can only
13:56:58 4 speak to my own experience as a civil division attorney.
13:57:00 5 I don't know that there's a uniformity of practice
13:57:03 6 throughout the entire department. And I know that, in
13:57:05 7 the civil division, we have annual ethics training
13:57:09 8 requirements which are spelled out in Mr. Mizer's
13:57:11 9 declaration in which I believe we have also described
13:57:14 10 for the court in -- in prior --

13:57:16 11 THE COURT: No, I've read them online, but
13:57:18 12 those don't necessarily cover a specific state.

13:57:21 13 MR. GILLIGAN: Correct, Your Honor.

13:57:22 14 THE COURT: How do you know you're complying
13:57:23 15 with the Rules of Ethics in Texas if you've never read
13:57:26 16 them?

13:57:28 17 MR. GILLIGAN: Well --

13:57:29 18 THE COURT: I'm -- I'm -- I'm saying that
13:57:30 19 hypothetically. I'm not saying you've never read them,
13:57:33 20 but, I mean --

13:57:34 21 MR. GILLIGAN: Right. Your -- Your Honor,
13:57:35 22 I -- there's -- I -- I -- I can't -- I don't know the
13:57:39 23 decision making behind the department's determination of
13:57:43 24 what training attorneys require before they -- in order
13:57:50 25 to perform their function as -- as a Government counsel

13:57:55 1 and -- and in order to appear in the various states of
13:57:59 2 the union as -- as they represent the Government where
13:58:03 3 it is -- where it is a Defendant in a litigation.

13:58:08 4 So I can't answer the question insofar as,
13:58:14 5 you know, what is -- what is our leadership's thinking
13:58:17 6 behind the -- the ethics training requirements we have.

13:58:20 7 But they -- I -- I'm aware, at least as a
13:58:22 8 civil division attorney, that I must annually engage in
13:58:26 9 multiple hours of both attorney and Government ethics
13:58:28 10 training with the purpose being to assure that my
13:58:30 11 conduct is in keeping with the ethical standards, which
13:58:34 12 I -- I think it's fair to say are somewhat uniform from
13:58:38 13 state to state.

13:58:39 14 Yes -- yes, there is a variance, but,
13:58:41 15 certainly, at least the basics are the same. Certainly
13:58:44 16 concepts such as candor and forthrightness to the
13:58:48 17 tribunal are -- are universal concepts.

13:58:51 18 The -- the --

13:58:51 19 THE COURT: No, I'm -- I mean, there's no
13:58:56 20 differentiation as it applies to our issue here, but
13:58:57 21 I -- that's why I was trying to make sure you understand
13:58:59 22 I was speaking hypothetically. I mean, it would seem
13:59:02 23 like it would be a, you know, a good rule for the
13:59:09 24 justice department to have for their own attorneys that,
13:59:12 25 before you appear in the courts of Indiana or the courts

13:59:16 1 of Illinois, that you at least have a familiarity, at
13:59:21 2 least have read the Code of Ethics of by which you're
13:59:23 3 bound.

13:59:23 4 MR. GILLIGAN: Well, Your Honor, I -- I
13:59:26 5 think I could say this, which is I have some confidence
13:59:28 6 that the transcript of this hearing today will be widely
13:59:32 7 read within the department and so perhaps your
13:59:33 8 suggestion will be taken note of.

13:59:34 9 THE COURT: All right. Let's go back to the
13:59:36 10 issue of should I or should I not consider these
13:59:40 11 affidavits. And I do appreciate the affidavits. I -- I
13:59:44 12 wish I'd had them a year ago when I asked for them, but
13:59:48 13 let's talk about that.

13:59:49 14 MR. GILLIGAN: Well, Your Honor, again, you
13:59:53 15 extended the opportunity to us on June 7th to submit
13:59:57 16 additional evidence and we -- as I say, we were
14:00:01 17 extraordinarily grateful for that opportunity and we --
14:00:03 18 we seized the opportunity on this occasion and -- and
14:00:07 19 provided the Court with over 100 pages of sworn
14:00:10 20 testimony on the issues that are addressed in the
14:00:12 21 Court's May 19th order.

14:00:17 22 The testimony is uniform, it is mutually
14:00:21 23 corroborating, it is detailed and it explains in great
14:00:26 24 detail the events that led to the various
14:00:29 25 representations that were made to the court and explains

14:00:32 1 that there was never any intent on the part of any of
14:00:36 2 the attorneys involved to deceive the Court about the
14:00:39 3 three year terms or to withhold information from the
14:00:41 4 court about the three year terms for the simple reason
14:00:44 5 that three year terms simply were not on our counsel's
14:00:48 6 minds at the times in question.

14:00:50 7 Because, as explained in the declaration
14:00:54 8 testimony, that was a -- the information that they
14:00:58 9 received about the three year terms resulted in only a
14:01:06 10 brief awareness about that before it faded from
14:01:12 11 conscious awareness in what can only be called at the
14:01:15 12 time in December of 2014 the Fog of War.

14:01:17 13 The -- the -- the intense pressures of not
14:01:25 14 one but two cases challenging a very important national
14:01:28 15 federal program, the Plaintiffs in both cases had moved
14:01:31 16 for preliminary injunctions, both cases were proceeding
14:01:35 17 on simultaneous fast track timetables.

14:01:37 18 The attorneys were being inundated with
14:01:41 19 tremendous amounts of information from the client agency
14:01:44 20 about the administration and enforcement of the
14:01:46 21 immigration laws. They were trying to understand how
14:01:49 22 this information bore on complex and, at least to them,
14:01:54 23 novel, legal issues.

14:01:55 24 All while trying to get briefs written
14:01:58 25 and -- and -- and to prepare for hearings, you know,

14:02:00 1 within days.

14:02:02 2 And -- and so there came at one point this
14:02:07 3 blip on the radar, but it quickly fell off the radar
14:02:12 4 because, to those who were at the center of these
14:02:15 5 events, in the serenity of litigation, what appeared to
14:02:19 6 them to be the true issue of moment in light of the
14:02:22 7 arguments that had been made by the states in the case,
14:02:27 8 at least for purposes of the PI proceeding, was when
14:02:31 9 would DHS begin to implement the expanded eligibility
14:02:37 10 guidelines.

14:02:37 11 Because it was the expansion of the
14:02:38 12 population eligible for deferred action to which the
14:02:42 13 states had tethered their claims of irreparable injury,
14:02:47 14 not to an -- an increase in the term of deferred action
14:02:51 15 provided, in particular, under the 2012 DACA guidelines,
14:02:56 16 which were unchallenged in the litigation.

14:02:58 17 So, while it -- it -- it, in retrospect,
14:03:06 18 perhaps, the perspective that they took matters may have
14:03:10 19 been too narrow, the perspective they took was certainly
14:03:13 20 reasonable and perfectly natural.

14:03:15 21 Again, given the -- the -- the issues as
14:03:19 22 they had been framed, not by them, but by the pleadings
14:03:23 23 filed by the states, and the incredible time pressures
14:03:27 24 they were under and the need to focus on what was most
14:03:30 25 obviously relevant and deal -- and deal with those

14:03:33 1 issues, rather than things that, you know, appeared,
14:03:36 2 at -- at best, to be tangentially relevant.

14:03:38 3 So, at the time of the December 19th
14:03:42 4 telephone conference, for example, the -- the three year
14:03:45 5 terms were not on our counsel's mind. And, so, when the
14:03:50 6 question was raised by the states' counsel about the
14:03:54 7 speed with which the new program would be -- would be
14:03:59 8 implemented and whether anything would happen to change
14:04:02 9 the playing field before the hearing could be had on the
14:04:05 10 states' motion, our counsel took that as a reference to
14:04:10 11 implementing the expanded eligibility guidelines; first,
14:04:14 12 because that was consistent, not just with that
14:04:16 13 individual's view of the case, but with the collective
14:04:20 14 view of the case that the entire team of attorneys at --
14:04:25 15 at the justice department had of the case.

14:04:27 16 And also, it -- that was counsel's
14:04:30 17 understanding of the question that had been posed.
14:04:35 18 Because, at that time, counsel simply had no
14:04:39 19 recollection regarding the three year terms at that
14:04:42 20 point.

14:04:43 21 The -- the same was true at the preliminary
14:04:46 22 injunction hearing where Your Honor was discussing with
14:04:51 23 counsel the question of our request for an extension of
14:04:55 24 time to file a surreply.

14:04:57 25 THE COURT: Tell me -- let me jump ahead.

14:05:02 1 Right before the March 3rd advisory, it pops up on the
14:05:12 2 radar screen of one of the attorneys because of the
14:05:15 3 number. And this is what I -- I don't understand and I
14:05:19 4 need some, I guess, clarification on. Why did that make
14:05:25 5 a difference?

14:05:28 6 You can assume for purposes of this argument
14:05:31 7 that -- that I've -- I've looked at enough of your
14:05:36 8 filings, both in terms of affidavits and in terms of
14:05:39 9 other filings that y'all have made in camera, that I
14:05:46 10 believe that, once it popped up on the radar screen,
14:05:49 11 y'all acted promptly.

14:05:52 12 But I can't -- I -- I still don't understand
14:05:55 13 why, you know, oh, my God, there's over 100,000 of
14:06:00 14 these, we'd better tell the Judge.

14:06:03 15 I mean, you know, why not 50,000? Why not
14:06:06 16 30,000? Why not 10? I mean, that's -- that's a point
14:06:10 17 I'm having problems with.

14:06:11 18 MR. GILLIGAN: Well, Your Honor, if -- if --
14:06:13 19 if the question is, or if the question assumes, and
14:06:18 20 correct me if I'm misunderstanding it, but if the
14:06:20 21 question assumes that the Department of Justice was
14:06:24 22 receiving periodic updates on the number of three year
14:06:26 23 terms that had been offered, that was not the case.

14:06:30 24 THE COURT: No. No. That's -- that's --
14:06:32 25 I'm not -- that's not my question really.

14:06:35 1 MR. GILLIGAN: Okay.

14:06:35 2 THE COURT: My question is: The injunction
14:06:42 3 gets entered. A couple weeks later, all of a sudden,
14:06:45 4 one of the attorneys involved realizes that there have
14:06:50 5 been these three year DACA renewals that have been made
14:06:54 6 and that they exceed 100,000. Because almost every
14:06:58 7 affidavit I've got said, came on our radar screen when
14:07:01 8 we realized how many there were.

14:07:04 9 And -- and my ruling, as you know, basically
14:07:10 10 took y'all to task on -- on whether, if you say, you
14:07:15 11 know, it's not happening, it doesn't matter whether
14:07:19 12 there's one or there's 100,000, you still haven't told
14:07:22 13 the truth to the Court.

14:07:25 14 And, initially, I agree with you because I
14:07:29 15 didn't understand the facts. And I may still not
14:07:35 16 understand the facts and that's why I'm asking you for
14:07:37 17 help here. I was worried that, you know, this was
14:07:40 18 information you sat on. And I think your evidence you
14:07:46 19 have given me now clearly dispels that notion, so --

14:07:51 20 MR. GILLIGAN: Thank you, Your Honor.

14:07:51 21 THE COURT: But -- but here's what I'm
14:07:53 22 trying to figure out. I'm trying to figure out why -- I
14:07:57 23 mean, if you didn't think it was wrong to begin with,
14:08:02 24 why tell me if there's 100,000?

14:08:04 25 MR. GILLIGAN: Well, it was -- it was not

14:08:06 1 simply learning the number. For -- for -- it -- it
14:08:09 2 was -- it was -- at -- at least -- I -- I hesitate here,
14:08:16 3 Your Honor, because I don't want to get into matters
14:08:17 4 that are still under seal.

14:08:19 5 But, to speak in general terms, it was a
14:08:27 6 simultaneity of -- of several factors.

14:08:29 7 It wasn't -- when it was reported that there
14:08:34 8 were 100,000 of these, it -- it was both putting a
14:08:39 9 number to it, but also returning to conscious awareness
14:08:43 10 for these attorneys a fact that they had forgotten
14:08:46 11 entirely.

14:08:47 12 So, if it had been -- if the number reported
14:08:50 13 had been 50,000, or 30, or 10, as the Court as said, it
14:08:54 14 still would have been for the attorneys a matter not
14:08:58 15 only of the number, but being, for some really learning
14:09:08 16 for the first time and others being reminded for the
14:09:11 17 first time since very early in the case, that this was
14:09:14 18 going on at all.

14:09:15 19 And, so, it was really, you know, it was
14:09:20 20 really a package of information there, not just the
14:09:22 21 number.

14:09:22 22 And that was combined further with the fact
14:09:25 23 that the court had not simply enjoined the
14:09:30 24 implementation of the new eligibility guidelines, which
14:09:34 25 had been, at least in the Government's understanding,

14:09:36 1 the focus of the proceedings, but, as we know, the Court
14:09:39 2 had enjoined any and all implementation of the changes
14:09:42 3 to the 2012 DACA program, which, of course, on its face,
14:09:46 4 would -- would include the -- the change from two to
14:09:50 5 three years of deferred action.

14:09:53 6 So, it was that combination of factors that
14:09:56 7 this -- this was a -- a -- an activity that the court
14:10:01 8 had now enjoined and that folks learned that it had been
14:10:06 9 occurring, or at least occurring on such a large scale,
14:10:09 10 that, suddenly, as -- as we tried to explain in the
14:10:11 11 papers we've submitted, that that suddenly gave the
14:10:14 12 three year terms a new relevance that -- that they
14:10:21 13 simply did not have in the minds of our attorneys
14:10:24 14 before.

14:10:24 15 And once -- you know, once -- before, we had
14:10:29 16 blips on the radar. Now we had a bomb going off. And
14:10:34 17 our bell was rung, the light went on, and as -- as
14:10:38 18 Your Honor said, once we realized that this was a fact
14:10:40 19 of importance that should be brought to the court's
14:10:42 20 attention, we acted with utmost speeds to get that
14:10:45 21 information to the Court and not only simply said, oh,
14:10:49 22 Your Honor, 100,000 of these three year terms were
14:10:53 23 granted.

14:10:54 24 We went further than that, Your Honor. I --
14:10:55 25 I want to under score, we went further in the March 3rd

14:10:58 1 advisory and pointed to the fact that this information
14:11:03 2 could be inconsistent with statements we had made
14:11:09 3 inadvertently. So we hope we have assured the Court
14:11:12 4 previously in the case.

14:11:13 5 So we -- we acted, once the light went on,
14:11:19 6 to comply with, you know, our duty of candor as we
14:11:24 7 understood it and -- and to do what the attorneys with
14:11:29 8 their own sense of -- of right and wrong and integrity
14:11:31 9 felt was the right thing to do.

14:11:33 10 THE COURT: Okay.

14:11:35 11 MR. GILLIGAN: And -- and, Your Honor, I --
14:11:38 12 essentially, for -- for that reason, we think that the
14:11:41 13 just result is to consider those declarations because
14:11:45 14 they do support the -- the truth of what we have been
14:11:48 15 saying of the position we have been informing the Court
14:11:52 16 of since the Court's April 7th order.

14:11:55 17 And -- and, therefore, we -- we respectfully
14:12:00 18 request that you, in -- in keeping with the facts
14:12:03 19 demonstrated by those declarations, withdraw both the
14:12:06 20 May 19th orders and the findings that they rest on in
14:12:13 21 the interest of justice.

14:12:14 22 THE COURT: Okay. Thank you.

14:12:17 23 MR. GILLIGAN: Oh, oh, would Your Honor care
14:12:19 24 for me to address the issue regarding the PII?

14:12:23 25 THE COURT: I -- I didn't hear that. I'm

14:12:24 1 sorry?

14:12:25 2 MR. GILLIGAN: I'm sorry. I -- I -- I told
14:12:27 3 Your Honor at -- at -- at the beginning of my remarks
14:12:30 4 that I would like to address the issue of the PII that
14:12:34 5 you spoke to Ms. -- Ms. Perales about.

14:12:35 6 THE COURT: Yes, go ahead.

14:12:38 7 MR. GILLIGAN: As -- as I understand it, the
14:12:40 8 idea would be, instead of having the -- the PII that the
14:12:43 9 Court had talked about in its May 19th order filed under
14:12:46 10 seal with the court, that it would -- that DHS would
14:12:49 11 provide it to the Department of Justice for safe keeping
14:12:53 12 for some period of time.

14:12:53 13 Am I -- am I understanding the Court
14:12:55 14 correctly as far as that goes?

14:12:56 15 THE COURT: Well, I was just thinking of
14:12:56 16 giving it to an officer of the court affiliated with the
14:13:00 17 justice department if -- and that's, I thought,
14:13:07 18 apparently wrongfully, according to Ms. Perales, that
14:13:10 19 that would assuage anyone's concern because, you know,
14:13:14 20 the information would still be on this side of the V, so
14:13:18 21 to speak.

14:13:20 22 MR. GILLIGAN: Your Honor, as I -- as I said
14:13:22 23 a little while ago, that's -- that's an intriguing
14:13:25 24 proposal; one that I confess had not occurred to us
14:13:30 25 before we came into the courtroom today.

14:13:32 1 And -- and, so, what I would beg the Court's
14:13:39 2 indulgence to do is -- is, if possible, speak with my
14:13:42 3 client about this this afternoon and -- and to get back
14:13:46 4 to the court about that as quickly as possible?

14:13:48 5 THE COURT: Okay. That's -- you're welcome
14:13:50 6 to do that.

14:13:51 7 MR. GILLIGAN: All right, Your Honor. We
14:13:52 8 will -- we will attempt to do that and get back to the
14:13:54 9 court hopefully some time today if we can reach the
14:13:58 10 appropriate personnel in D.C.

14:14:00 11 Thank you, Your Honor.

14:14:01 12 THE COURT: Okay. And -- and let me add, if
14:14:03 13 you'll recall from our last hearing, assuming I -- I
14:14:09 14 don't change it, my order was written broadly, but all I
14:14:13 15 was talking about was, you know, basic identifiers.

14:14:16 16 MR. GILLIGAN: Yes, we -- we -- we -- we do
14:14:18 17 recall that, Your Honor, from -- from the June 7th
14:14:20 18 hearing and we appreciate that clarification as well.
14:14:22 19 That that was -- that came as quite a relief to my
14:14:26 20 client.

14:14:26 21 THE COURT: Okay. All right. Mr. Fogler,
14:14:31 22 you have a client that has an interest in this. Would
14:14:34 23 you like to say anything?

14:14:35 24 MR. FOGLER: Yes, Your Honor. Very briefly.
14:14:40 25 First of all, as a practical matter, I don't -- I don't

14:14:44 1 think you could be faulted for considering any of the
14:14:47 2 evidence in front of you. And, of course, you have the
14:14:50 3 discretion to afford it whatever weight you choose.

14:14:53 4 But, from the standpoint of my client, the
14:14:56 5 sealed filer, your opportunity in June of this year is
14:15:01 6 really the first opportunity that the sealed filer had
14:15:05 7 to provide an explanation and an apology separate from
14:15:09 8 the Department of Justice. And that's --

14:15:12 9 THE COURT: Well, and you -- and you
14:15:12 10 understand, Mr. Fogler, I've been asking for that, for
14:15:14 11 not an apology, I've been asking for evidence of good
14:15:17 12 faith for over a year?

14:15:19 13 MR. FOGLER: I -- I can appreciate that and
14:15:20 14 I haven't been involved, but you, from the -- from
14:15:24 15 the -- again, from the standpoint of the sealed filer,
14:15:27 16 once your April of 2015 order was issued, the sealed
14:15:32 17 filer was recused from any further decision making.

14:15:36 18 THE COURT: No, I understand that.

14:15:38 19 MR. FOGLER: And so that was the first
14:15:39 20 opportunity, then, that the sealed filer had to make
14:15:40 21 that point.

14:15:41 22 So -- and the other -- the only other point
14:15:44 23 is, because I think it's important based on your
14:15:47 24 comments from the sealed filer's standpoint, the number
14:15:51 25 didn't matter because the sealed filer had no conscious

14:15:55 1 knowledge whether it was one or 100,000 until very late
14:16:00 2 February or early March of -- of 2014.

14:16:04 3 So that's all I -- I wanted to say.

14:16:05 4 THE COURT: All right.

14:16:07 5 MR. FOGLER: Thank you, Your Honor.

14:16:08 6 THE COURT: Thank you, Mr. Fogler.

14:16:09 7 Mr. Bitter, anything you or Ms. Perales want
14:16:15 8 to add?

14:16:15 9 MR. BITTER: I just want to add one point on
14:16:17 10 the -- the personally identifiable information.

14:16:20 11 I'm not sure immediately that, you know, we
14:16:22 12 have a position on the ministerial act of whether the --
14:16:26 13 the -- the data would go to an officer of the court or
14:16:28 14 to the -- the Court under seal pursuant to the previous
14:16:32 15 order, but the only two points I would raise to that is
14:16:34 16 that, under the Court's May 2016 order, the state still
14:16:39 17 has to make a -- a showing of good cause to be able to
14:16:41 18 obtain that data.

14:16:43 19 And we understand the concerns that have
14:16:44 20 been raised by the Jane Doe's and others with respect to
14:16:48 21 the privacy associated with that data. We -- we
14:16:52 22 appreciate those concerns. And I would just point out
14:16:54 23 that, as to the post-injunction grantees, we were able
14:16:57 24 to work out a protective order reflecting -- you know,
14:16:59 25 reflecting certain protections on that data. And I

14:17:03 1 would certainly point out that, you know, we would
14:17:04 2 certainly be amenable to enter into any kind of
14:17:06 3 protective order regarding that data as well.

14:17:09 4 Those are the only two points I would -- I
14:17:11 5 want to add on that.

14:17:12 6 THE COURT: All right. Thank you.

14:17:13 7 MR. BITTER: Thank you, Your Honor.

14:17:14 8 THE COURT: Ms. Perales, anything you'd like
14:17:16 9 to add?

14:17:16 10 MS. PERALES: Yes, Your Honor. All of the
14:17:18 11 arguments the Jane Doe's presented in oral argument in
14:17:21 12 June, as well as in their brief, apply to an order that
14:17:25 13 would have the DACA recipients' personal information
14:17:31 14 taken out of the current Government records and given to
14:17:35 15 somebody else. Whether that's the Court, whether that's
14:17:38 16 an officer of the court. All -- all of the arguments
14:17:40 17 remain the same so I wanted to make sure that I said
14:17:43 18 that.

14:17:43 19 THE COURT: No, I understood that.

14:17:44 20 MS. PERALES: And I -- I do not understand,
14:17:46 21 and I'm obviously not a party to whatever Mr. Gilligan
14:17:50 22 is going to say or do with his clients, but, if the
14:17:54 23 Government does file something in response to the
14:17:57 24 Court's suggestion, the Doe's would simply want the
14:18:00 25 opportunity to file something in response.

14:18:02 1 THE COURT: Okay. And you have that -- you
14:18:04 2 have my permission to do that.

14:18:05 3 MS. PERALES: Thank you.

14:18:06 4 THE COURT: I mean, I -- I think all parties
14:18:10 5 here realize, but maybe I should say it, that my intent
14:18:16 6 here with regard to that filing, was twofold: One, that
14:18:22 7 was the subject matter of the misrepresentations. And,
14:18:30 8 as such, you know, fixing it was a -- I won't say a
14:18:38 9 priority -- but part of a -- a remedy, if you will.

14:18:42 10 And -- and then, secondly, if the states
14:18:45 11 were harmed, and I've not been shown any harm, but I
14:18:52 12 would -- and -- and Mr. Bitters is quite correct, even
14:18:59 13 if I decided to order that information be kept with an
14:19:02 14 officer of the court, that -- there's -- I would not
14:19:05 15 change anything as far as putting the burden on the
14:19:09 16 states to come forward, obviously, in a hearing with
14:19:13 17 everyone present to actually show me that they have
14:19:16 18 somehow been harmed by this.

14:19:19 19 Because to date, I -- I can't see the harm.
14:19:27 20 But, out of an abundance of caution, both then and now,
14:19:30 21 I don't want to rule that there is no harm because I
14:19:33 22 don't know that. I mean, you know, I have no way of
14:19:36 23 knowing whether there's harm or not.

14:19:39 24 And, you know, I -- I kind of sideswiped
14:19:41 25 Mr. Bitter today by asking him that and -- and he not

14:19:45 1 only represents the State of Texas, he represents 25
14:19:48 2 other states and he doesn't know if they're harmed or
14:19:50 3 not either.

14:19:53 4 And -- and, so, it was -- it was more of a
14:19:57 5 precaution than anything else.

14:20:00 6 All right. I have --

14:20:03 7 MR. GILLIGAN: Your Honor, may I -- may I
14:20:04 8 just say one thing --

14:20:05 9 THE COURT: You may.

14:20:06 10 MR. GILLIGAN: -- in response to what you
14:20:07 11 just said?

14:20:08 12 Regarding the -- how to handle the PII, I
14:20:12 13 just want to under score that the Government considers
14:20:14 14 that to be a -- a matter independent of the sanctions
14:20:17 15 question in that we do not believe that, you know, some
14:20:23 16 sort of resolution of the issues surrounding PII and the
14:20:27 17 demonstration that -- that the states might be able to
14:20:30 18 make of -- of good cause to obtain PII or of harm
14:20:37 19 resulting from the issuance of the three year terms,
14:20:39 20 that any of those matters are necessarily, or -- or for
14:20:42 21 that matter, should be linked to the question of --
14:20:44 22 of -- of sanctions. We think that -- that those are
14:20:46 23 more appropriately approached and can be dealt with as a
14:20:50 24 matter of the court's equitable powers.

14:20:53 25 And, so, we -- we -- I just wanted to say

14:20:56 1 that we would be prepared to address all of those
14:21:01 2 questions, shall I say, on the assumption that, or on --
14:21:05 3 or in the hope that the Court will withdraw its May 19th
14:21:10 4 orders and then we can proceed separately to deal with
14:21:13 5 those issues regarding the PII and the 108,000.

14:21:20 6 THE COURT: Okay. All right.

14:21:21 7 All right. Here's -- here's the way --
14:21:23 8 I'm -- I'm going to take under submission the issue of,
14:21:29 9 number one, should and will I consider the affidavits
14:21:34 10 that I've finally been given? And, if so, how does that
14:21:38 11 affect my prior ruling? So, that, I'm -- I'm taking
14:21:38 12 under submission.

14:21:42 13 The stay with regard to any kind of relief
14:21:44 14 remains in place.

14:21:48 15 Mr. Tyler's agreement with the -- or the
14:21:53 16 Government's agreement as expressed by Mr. Tyler with
14:21:55 17 the states as far as how we're going to move forward
14:22:00 18 with this case, how and if we are, vis-a-vis what the
14:22:05 19 Supreme Court's going to do on the motion for rehearing,
14:22:08 20 I'm -- I -- I will reduce that to an order.

14:22:10 21 But basically it's going to just echo the
14:22:12 22 agreement that -- that y'all indicated you had.

14:22:16 23 And then I'm denying the motion to inter --
14:22:19 24 intervene. Although, I don't think I'm going to use the
14:22:26 25 Government's nickname for the Intervenor.

14:22:29 1 All right. Anything else that anybody wants
14:22:33 2 to raise while we're here together?

14:22:35 3 MR. BITTER: Your Honor, we have one point
14:22:37 4 we want to raise.

14:22:37 5 THE COURT: All right.

14:22:38 6 MR. BITTER: Your Honor may already be aware
14:22:40 7 of it, but we wanted to bring it to the court's
14:22:42 8 attention and -- and see if the Defendants had any
14:22:44 9 information they could provide, we have learned that,
14:22:46 10 just in the last, I believe in the last week or so,
14:22:48 11 there was a federal lawsuit filed in the Eastern
14:22:51 12 District of New York by an individual who's within that
14:22:54 13 group of persons who got the three year EAD who was
14:22:59 14 clawed back to a two year term.

14:23:01 15 He's brought suit against some officials of
14:23:04 16 the USCIS challenging the -- the nationwide scope of the
14:23:08 17 injunction issued by this court, which, of course, was
14:23:11 18 affirmed by the -- by the Fifth Circuit and by the
14:23:14 19 Supreme Court.

14:23:14 20 Again, it was -- it was just recently filed.
14:23:16 21 We want to bring it to the court's attention because
14:23:18 22 obviously it is a -- you know, it is certainly an
14:23:21 23 attempted attack on the injunction that was issued here.

14:23:24 24 The State of Texas is not a party, none of
14:23:26 25 the Plaintiff states are a party, but, at this point, we

14:23:28 1 at least just want to, you know, bring the Court's
14:23:31 2 attention to it.

14:23:31 3 We -- we believe, you know, from our reading
14:23:33 4 of it, the -- the complaint has no merit in terms of
14:23:36 5 trying to attack the -- the injunction that was issued
14:23:39 6 here, but we certainly do have concerns on how that case
14:23:42 7 may proceed in terms of the challenge that may be raised
14:23:45 8 against the injunction here.

14:23:46 9 So, again, at this point, we just wanted to
14:23:48 10 bring it to the attention of the Court.

14:23:50 11 THE COURT: He's a -- a DACA person who,
14:23:52 12 after the injunction, wasn't given a three year renewal
14:23:57 13 and then they -- so they traded back his three year for
14:23:59 14 a two year?

14:24:00 15 MR. BITTER: That's as we understand it from
14:24:01 16 the complaint that he's in kind of what we've referred
14:24:03 17 to as the gap group of -- of the -- the 2,000 or so
14:24:06 18 individuals that received the two year -- I'm sorry, the
14:24:09 19 three year term after the injunction and part of the
14:24:11 20 group that they were clawed back by the Defendants
14:24:15 21 remedial efforts. And he's challenging that revocation
14:24:18 22 of the three year term into a -- in a two year term.

14:24:21 23 THE COURT: Okay.

14:24:23 24 MR. BITTER: Thank you, Your Honor.

14:24:24 25 THE COURT: All right. Do y'all even know

14:24:25 1 about that case?

14:24:26 2 MR. TYLER: We do, Your Honor. It was filed
14:24:28 3 in Brooklyn. And so we are familiar with the complaint
14:24:32 4 and we'll be responding in due course, in the normal
14:24:36 5 course.

14:24:37 6 THE COURT: Well, presumably, if it's in the
14:24:40 7 same time period, he's about to be renewed for another
14:24:44 8 two years anyway, so his -- he will be beyond the period
14:24:48 9 of problem anyway.

14:24:50 10 But, if and when that becomes an issue in
14:24:53 11 this court, either one of y'all can raise it.

14:24:55 12 MR. TYLER: Okay. Thank you, Your Honor.

14:24:58 13 MS. PERALES: Your Honor, simply to say that
14:24:59 14 we are aware of the lawsuit, we've looked at the
14:25:01 15 complaint, but we don't have any involvement in it.

14:25:04 16 THE COURT: Okay. Okay. All right. We'll
14:25:07 17 stand adjourned. Thank y'all.

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1 REPORTER'S CERTIFICATE

2
3 I certify that the foregoing is a correct transcript
4 from the record of proceedings in the above-entitled
5 matter.
6

7
8 /s/ Sheila E. Perales.
SHEILA E. PERALES, CSR RPR CRR
9 Exp. Date: Dec. 31, 2016
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